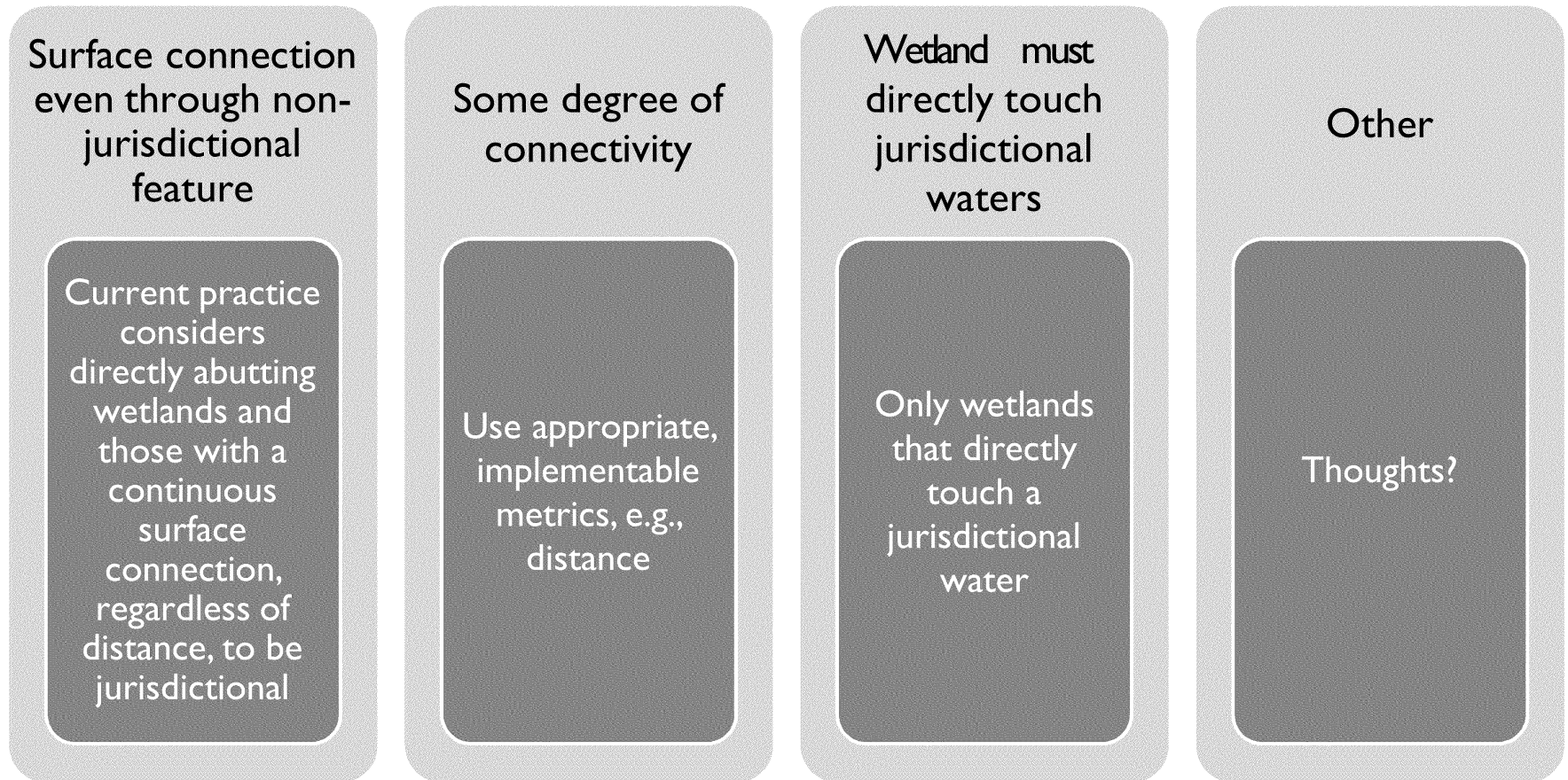


Potential Approaches to Wetlands with a “Continuous Surface Connection”



Questions and Discussion

- * How would you like to see the concepts of “relatively permanent” and “continuous surface connection” defined and implemented?
- * How do you think a reduction in Clean Water Act jurisdiction might affect your Tribal water programs, such as 401 water quality certification or water quality standards?
- * How might a change in definition and reduction in federal permitting affect other Tribal programs and interests?
- * If the definition changes, what would be the best way to “get the word out” and provide training and information to Tribes?

Next Steps

- * **Regional Tribal Operations Council Conference Calls**

- * June 7 – Region 4

- * June 22 – Region 8

- * May schedule additional sessions at other RTOC calls/meetings

- * **June 14 – National Congress of the American Indians Mid Year Conference**

- * **June 20 – Tribal consultation period concludes**

- * Comments can be submitted to CWAwotus@epa.gov and copied to Gude.Karen@epa.gov

- * **August 16 – Tribal Lands & Environment Forum**

Contacts

Project Leads

- * Donna Downing (EPA)
 - * (202) 566-2428
 - * CWAwotus@epa.gov
- * Stacey Jensen (Army Corps of Engineers)
 - * (202) 761-5903
 - * USACE_CWA_Rule@usace.army.mil

Tribal Liaison Contacts

- * Karen Gude (EPA)
 - * (202) 564-0831
 - * Gude.karen@epa.gov
- * Chip Smith (Army)
 - * (703) 693-3655

For Additional Information

*** Please visit our new website at:**

*** <https://www.epa.gov/wotus-rule>**

To: Downing, Donna[Downing.Donna@epa.gov]
From: Horchem, Brad
Sent: Thur 5/4/2017 8:56:28 PM
Subject: RE: Recurring WOTUS Regional/HQ Staff workgroup meeting

Donna,

Could you please add Steve Kovac to the Workgroup.

Steve is my supervisor.

Thanks

Brad

From: Downing, Donna
Sent: Thursday, May 04, 2017 12:24 PM
To: Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>; Sachs, Erica <Sachs.Erica@epa.gov>; Williams, Ann <Williams.Ann@epa.gov>; Montella, Daniel <Montella.Daniel@epa.gov>; Lapp, Jeffrey <lapp.jeffrey@epa.gov>; Shamet, Stefania <Shamet.Stefania@epa.gov>; Somerville, Eric <Somerville.Eric@epa.gov>; Able, Tony <Able.Tony@epa.gov>; Melgin, Wendy <melgin.wendy@epa.gov>; Schaller, Andrea <schaller.andrea@epa.gov>; Fontenot, Alison <Fontenot.Alison@epa.gov>; Schafer, Jeannette <schafer.jeannette@epa.gov>; McCarthy, Julia <McCarthy.Julia@epa.gov>; Livingston, Peggy <Livingston.Peggy@epa.gov>; Leidy, Robert <Leidy.Robert@epa.gov>; Dean, Heather <Dean.Heather@epa.gov>; Szalay, Endre <Szalay.Endre@epa.gov>; Cherry, Andrew <Cherry.Andrew@epa.gov>; Stokely, Peter <Stokely.Peter@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Flannery-Keith, Erin <Flannery-Keith.Erin@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>; Keating, Jim <Keating.Jim@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Ludwig-Monty, Sarah <ludwig-monty.sarah@epa.gov>; Balasa, Kate <balasa.kate@epa.gov>; Palomaki, Ashley <Palomaki.Ashley@epa.gov>; Cantilli, Robert <Cantilli.Robert@epa.gov>; Martinez, Maria <Martinez.Maria@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>; Morgan, James

<Morgan.James@epa.gov>

Cc: Peterson, Carol <Peterson.Carol@epa.gov>; Speir, Jeffrey <speir.jeffrey@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Horchem, Brad <horchem.brad@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>; Gude, Karen <Gude.Karen@epa.gov>; Moffatt, Brett <Moffatt.Brett@epa.gov>

Subject: Recurring WOTUS Regional/HQ Staff workgroup meeting

Hi Workgroupies!

This email is a reminder of the recurring WOTUS Regional/HQ staff workgroup meeting. The agenda for today includes:

Deliberative Process / Ex. 5

The “read only” version can be found here:

Nonresponsive Internal URL/ Ex. 6

The version of the same document open for your thoughts and general editing is here:

Nonresponsive Internal URL/ Ex. 6

- Timing of our meeting in two weeks

Talk to you this afternoon at 3pm EDT. Telecom and room location are in the invitation.

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Downing, Donna[Downing.Donna@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]
From: Somerville, Eric
Sent: Thur 5/4/2017 8:01:16 PM
Subject: USGS hydrological definitions

In case this is ultimately useful in some way:

Deliberative Process / Ex. 5

Eric Somerville

U.S. EPA Region 4 | Ocean, Wetlands & Streams Protection Branch

c/o SESD (F120-6) | 980 College Station Road | Athens, GA 30605-2720

tel 706.355.8514 | somerville.eric@epa.gov

From: Downing, Donna

Sent: Thursday, May 04, 2017 1:24 PM

To: Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>; Sachs, Erica <Sachs.Erica@epa.gov>; Williams, Ann <Williams.Ann@epa.gov>; Montella, Daniel <Montella.Daniel@epa.gov>; Lapp, Jeffrey <lapp.jeffrey@epa.gov>; Shamet, Stefania <Shamet.Stefania@epa.gov>; Somerville, Eric <Somerville.Eric@epa.gov>; Able, Tony <Able.Tony@epa.gov>; Melgin, Wendy <melgin.wendy@epa.gov>; Schaller, Andrea <schaller.andrea@epa.gov>; Fontenot, Alison <Fontenot.Alison@epa.gov>; Schafer, Jeannette <schafer.jeannette@epa.gov>; McCarthy, Julia <McCarthy.Julia@epa.gov>; Livingston, Peggy <Livingston.Peggy@epa.gov>; Leidy, Robert <Leidy.Robert@epa.gov>; Dean, Heather <Dean.Heather@epa.gov>; Szalay, Endre <Szalay.Endre@epa.gov>; Cherry, Andrew <Cherry.Andrew@epa.gov>; Stokely, Peter <Stokely.Peter@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Flannery-Keith, Erin <Flannery-Keith.Erin@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>; Keating, Jim <Keating.Jim@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Ludwig-Monty, Sarah

<ludwig-monty.sarah@epa.gov>; Balasa, Kate <balasa.kate@epa.gov>; Palomaki, Ashley <Palomaki.Ashley@epa.gov>; Cantilli, Robert <Cantilli.Robert@epa.gov>; Martinez, Maria <Martinez.Maria@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>; Morgan, James <Morgan.James@epa.gov>

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Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

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1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Downing, Donna[Downing.Donna@epa.gov]
Cc: McCarthy, Julia[McCarthy.Julia@epa.gov]
From: Livingston, Peggy
Sent: Thur 5/4/2017 6:05:32 PM
Subject: RE: Recurring WOTUS Regional/HQ Staff workgroup meeting

Privileged (Deliberative Process, Attorney-Client, Work Product, etc.)

Deliberative Process / Ex. 5

Sorry I have that other meeting at 3 pm Eastern today.

Peggy Livingston

Senior Enforcement Attorney

Legal Enforcement Program

U.S. EPA Region 8

1595 Wynkoop St.

Denver, CO 80202

(303) 312-6858 (phone)

(303) 312-7202 (fax)

From: Downing, Donna

Sent: Thursday, May 04, 2017 11:24 AM

To: Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>; Sachs, Erica <Sachs.Erica@epa.gov>; Williams, Ann <Williams.Ann@epa.gov>; Montella, Daniel <Montella.Daniel@epa.gov>; Lapp, Jeffrey <lapp.jeffrey@epa.gov>; Shamet, Stefania <Shamet.Stefania@epa.gov>; Somerville, Eric <Somerville.Eric@epa.gov>; Able, Tony <Able.Tony@epa.gov>; Melgin, Wendy <melgin.wendy@epa.gov>; Schaller, Andrea <schaller.andrea@epa.gov>; Fontenot, Alison <Fontenot.Alison@epa.gov>; Schafer, Jeannette <schafer.jeannette@epa.gov>; McCarthy, Julia <McCarthy.Julia@epa.gov>; Livingston, Peggy <Livingston.Peggy@epa.gov>; Leidy, Robert <Leidy.Robert@epa.gov>; Dean, Heather <Dean.Heather@epa.gov>; Szalay, Endre <Szalay.Endre@epa.gov>; Cherry, Andrew <Cherry.Andrew@epa.gov>; Stokely, Peter <Stokely.Peter@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Flannery-Keith, Erin <Flannery-Keith.Erin@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>; Keating, Jim <Keating.Jim@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Ludwig-Monty, Sarah <ludwig-monty.sarah@epa.gov>; Balasa, Kate <balasa.kate@epa.gov>; Palomaki, Ashley <Palomaki.Ashley@epa.gov>; Cantilli, Robert <Cantilli.Robert@epa.gov>; Martinez, Maria <Martinez.Maria@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>; Morgan, James <Morgan.James@epa.gov>

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Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

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downing.donna@epa.gov

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1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Downing, Donna[Downing.Donna@epa.gov]
From: Kovatch, Charles
Sent: Wed 5/3/2017 10:49:08 PM
Subject: RE: Monthly Wetlands Regional Managers call

Donna

Kudos to you and others on the team who sent the WOTUS Step 1 version to OMB!!

Charles

From: Downing, Donna
Sent: Wednesday, May 3, 2017 4:34 PM
To: Able, Tony <Able.Tony@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Brush, Jason <Brush.Jason@epa.gov>; Derby, Jennifer <Derby.Jennifer@epa.gov>; Hamilton, Karen <Hamilton.Karen@epa.gov>; Horchem, Brad <horchem.brad@epa.gov>; Lapp, Jeffrey <lapp.jeffrey@epa.gov>; LeClair, Jacqueline <Leclair.Jackie@epa.gov>; Martinez, Maria <Martinez.Maria@epa.gov>; Martinsen, Jessica <Martinsen.Jessica@epa.gov>; Melgin, Wendy <melgin.wendy@epa.gov>; Montella, Daniel <Montella.Daniel@epa.gov>; Szerlog, Michael <Szerlog.Michael@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Kovatch, Charles <Kovatch.Charles@epa.gov>; Amato, Paul <Amato.Paul@epa.gov>
Cc: Weaver, Kerryann <weaver.kerryann@epa.gov>; Shaw, Hanh <Shaw.Hanh@epa.gov>
Subject: Monthly Wetlands Regional Managers call

Hi Regional managers:

Mindy and I talked, and concluded that the primary update we have for the Regional Branch Chiefs Update Meeting is that the Step 1 WOTUS rule went to OMB review last Friday and has been logged in on OMB's public website. Given the limited agenda, we think we'll cancel tomorrow's meeting.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

So Expect to see a cancellation notice for tomorrow's BC update meeting shortly.

Donna

Donna Downing

Acting Chief, Wetlands and Aquatic Resources Regulatory Branch

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Doley, Todd[Doley.Todd@epa.gov]
From: Hewitt, Julie
Sent: Wed 5/3/2017 10:43:14 PM
Subject: Governors letter

Hi there,

Deliberative Process / Ex. 5

Thanks,

Julie

Julie Hewitt

Associate Director for Economics

Engineering and Analysis Division

Office of Science & Technology, Office of Water

U.S. Environmental Protection Agency

EPA West Building

1200 Pennsylvania Avenue, N.W.

Room 6233-H and Mail Code 4303T
Washington, DC 20460

(202) 566-1031

(202) 566-1053 fax

Hewitt.Julie@epa.gov

<https://www.epa.gov/eg>

<https://www.epa.gov/cooling-water-intakes>

To: Downing, Donna[Downing.Donna@epa.gov]
From: Melgin, Wendy
Sent: Wed 5/3/2017 8:41:24 PM
Subject: RE: Monthly Wetlands Regional Managers call

Deliberative Process / Ex. 5

From: Downing, Donna
Sent: Wednesday, May 03, 2017 3:34 PM
To: Able, Tony <Able.Tony@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Brush, Jason <Brush.Jason@epa.gov>; Derby, Jennifer <Derby.Jennifer@epa.gov>; Hamilton, Karen <Hamilton.Karen@epa.gov>; Horchem, Brad <horchem.brad@epa.gov>; Lapp, Jeffrey <lapp.jeffrey@epa.gov>; LeClair, Jacqueline <Leclair.Jackie@epa.gov>; Martinez, Maria <Martinez.Maria@epa.gov>; Martinsen, Jessica <Martinsen.Jessica@epa.gov>; Melgin, Wendy <melgin.wendy@epa.gov>; Montella, Daniel <Montella.Daniel@epa.gov>; Szerlog, Michael <Szerlog.Michael@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Kovatch, Charles <Kovatch.Charles@epa.gov>; Amato, Paul <Amato.Paul@epa.gov>
Cc: Weaver, Kerryann <weaver.kerryann@epa.gov>; Shaw, Hanh <Shaw.Hanh@epa.gov>
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Donna

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Washington, DC 20004

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]
Cc: Downing, Donna[Downing.Donna@epa.gov]
From: Brush, Jason
Sent: Wed 5/3/2017 8:08:01 PM
Subject: FW: Final WOTUS ppt for R9 RTOC ?
WOTUS2 tribal info and consultation - R9.RTOC.Brush.pptx

Deliberative Process / Ex. 5

Thanks - Jason

Jason A. Brush
Acting Assistant Director, Water Division
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street (WTR-2)
San Francisco, CA 94105

~~~~~  
**desk: 415.972.3483**  
~~~~~

From: Christensen, Damaris
Sent: Wednesday, May 03, 2017 12:51 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>; Brush, Jason <Brush.Jason@epa.gov>

Cc: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: Final WOTUS ppt for R9 RTOC ?

Rose, I didn't see any formatting issues pop up.

Jason, you are going to walk through the powerpoint, right? Do you have any questions for us before we put you on the spot? Some slides have notes more than TPs; others have nothing.

Thanks again!

Damaris

From: Kwok, Rose
Sent: Wednesday, May 03, 2017 1:31 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Brush, Jason <Brush.Jason@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>
Subject: Re: Final WOTUS ppt for R9 RTOC ?

I don't think my personal computer has the font that the PPT is in - can someone check this to make sure the slides look ok? Jason - I've updated the title slide and the next steps slide to make it up-to-date. Please let the tribes know that the content in this PPT is the same as the one from April and will be the same for the webinar in May. Thanks!!!

Rose Kwok

U.S. Environmental Protection Agency

Wetlands Division

kwok.rose@epa.gov

202-566-0657, 202-566-1375 (fax)

From: Christensen, Damaris
Sent: Wednesday, May 3, 2017 1:07:38 PM
To: Kwok, Rose; Brush, Jason
Cc: Downing, Donna
Subject: RE: Final WOTUS ppt for R9 RTOC ?

Ok will leave to you, thanks.

And I happened to be on the phone with Donna so can confirm we both are standing down. ☺

All, I know Rose is elsewhere working through some connection issues with Paul Amato. Do we need to try and schedule a meeting to do a run-through or talk through the process this afternoon or tomorrow morning with everyone from Region 9?

If so, Rose, give me an approx.. time and I can take care of setting the meeting up if you'd like. If I don't hear from you I will assume you have this under control and people from R9 are comfortable.

Damaris

From: Kwok, Rose
Sent: Wednesday, May 03, 2017 1:04 PM
To: Brush, Jason <Brush.Jason@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>
Subject: Re: Final WOTUS ppt for R9 RTOC ?

Jason - this looks like an older version. I'll send you the right version momentarily. D&D - I need to make a correction from the version that is currently on SP

Rose Kwok

U.S. Environmental Protection Agency

Wetlands Division

kwok.rose@epa.gov

202-566-0657, 202-566-1375 (fax)

From: Brush, Jason
Sent: Wednesday, May 3, 2017 12:47:34 PM
To: Christensen, Damaris; Kwok, Rose
Cc: Downing, Donna
Subject: Final WOTUS ppt for R9 RTOC ?

Hi guys – Can you make sure I have the final, please? Cheers - JB

Jason A. Brush
Acting Assistant Director, Water Division
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street (WTR-2)
San Francisco, CA 94105

~~~~~  
**desk: 415.972.3483**  
~~~~~

From: Louis, Gail
Sent: Wednesday, May 03, 2017 9:43 AM
To: Brush, Jason <Brush.Jason@epa.gov>
Cc: Amato, Paul <Amato.Paul@epa.gov>
Subject: FW: WOTUS Information Session at May R9 RTOC Meeting

This is the latest version I saw. We need to correct the typo (Regional Tribal Operations Committee).

^`.,.,.><(((^.`.,.,.><(((^.`.,.,.><(((^`.
Gail Louis, Manager

Tribal Water Section

US EPA Region 9, Water Division
75 Hawthorne Street (WTR-3-4)
San Francisco, CA 94105
Phone: (415) 972-3467
Fax: (415) 947-3537
Email: louis.gail@epa.gov

^`.,.,.><(((^.`.,.,.><(((^.`.,.,.><(((^`.

From: Christensen, Damaris

Sent: Monday, April 24, 2017 2:17 PM

To: Ebbert, Laura <Ebbert.Laura@epa.gov>; Amato, Paul <Amato.Paul@epa.gov>; Brush, Jason <Brush.Jason@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Mojica Hernandez, Ruben <mojica-hernandez.ruben@epa.gov>; Louis, Gail <Louis.Gail@epa.gov>

Cc: Gude, Karen <Gude.Karen@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>

Subject: RE: WOTUS Information Session at May R9 RTOC Meeting

Still draft, but a slightly later version per our discussion today.

Damaris

From: Christensen, Damaris

Sent: Monday, April 24, 2017 11:22 AM

To: Ebbert, Laura <Ebbert.Laura@epa.gov>; Amato, Paul <Amato.Paul@epa.gov>; Brush, Jason <Brush.Jason@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Mojica Hernandez, Ruben <mojica-hernandez.ruben@epa.gov>; Louis, Gail <Louis.Gail@epa.gov>

Cc: Gude, Karen <Gude.Karen@epa.gov>; Kwok, Rose <kwok.rose@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>

Subject: RE: WOTUS Information Session at May R9 RTOC Meeting

Here's the DRAFT powerpoint.

Damaris

-----Original Appointment-----

From: Christensen, Damaris

Sent: Saturday, April 22, 2017 10:56 PM

To: Christensen, Damaris; Ebbert, Laura; Amato, Paul; Brush, Jason; Eisenberg, Mindy; Bennett, Brittany; Mojica Hernandez, Ruben; Louis, Gail

Cc: Gude, Karen; Kwok, Rose; Wesson, Dolores

Subject: WOTUS Information Session at May R9 RTOC Meeting

When: Monday, April 24, 2017 3:30 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).

Where: DCRoomWest7129/DC-CCW-OWOW also **Nonresponsive Conference Code/ Ex. 6**

Hi all,

Call-in: **Nonresponsive Conference Code/ Ex. 6**

This is to touch base about the R9 RTOC tribal info session/ leader to leader consultation. Karen is on AL till Wednesday, but then I'm out till the end of the week, so we'll make sure to coordinate here at HQ.

I'm attaching the tribal consultation letter that went out Thursday, and Karen's email below initially reaching out to Laura. We have a draft powerpoint as well and I'll try to send a copy of that when we get a few more comments from people.

I do have one question for you all: is this meeting set-up likely to allow for people from EPA HQ or Corps HQ to call in?

Damaris

Rose – since you have another meeting scheduled tentatively at this time, and will be in Utah at another meeting May 3-4, don't feel you have to attend this, but consider it an FYI.

From: Gude, Karen

Sent: Tuesday, April 18, 2017 7:13 AM

To: Ebbert, Laura <Ebbert.Laura@epa.gov>

Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>

Subject: Seeking WOUS Information Session at May R9 RTOC Meeting, if Possible

Laura,

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Deliberative Process / Ex. 5

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Thank you,

Karen Gude

Tribal Program Coordinator (detail)

U.S. EPA/Office of Water

Phone: (202) 564-0831

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Brush, Jason[Brush.Jason@epa.gov]
Cc: Downing, Donna[Downing.Donna@epa.gov]
From: Kwok, Rose
Sent: Wed 5/3/2017 7:58:27 PM
Subject: Re: Final WOTUS ppt for R9 RTOC ?

One update to since the last webinar is that it is now officially on the OMB website that we are in interagency EO 12866 review - we should probably verbally mention that in the

presentation: <https://www.reginfo.gov/public/do/eoReviewSearch;jsessionid=6A8B2C4DDF320F71868>



Rose Kwok

U.S. Environmental Protection Agency

Wetlands Division

kwok.rose@epa.gov

202-566-0657, 202-566-1375 (fax)

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Gail Louis, Manager

Tribal Water Section

US EPA Region 9, Water Division  
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**When:** Monday, April 24, 2017 3:30 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).

**Where:** DCRoomWest7129/DC-CCW-OWOW also **Nonresponsive Conference Code/ Ex. 6**

Hi all,

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**Deliberative Process / Ex. 5**

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U.S. Environmental Protection Agency

Wetlands Division

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202-566-0657, 202-566-1375 (fax)

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**Cc:** Downing, Donna  
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**Jason A. Brush**  
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**U.S. Environmental Protection Agency, Region 9**  
**75 Hawthorne Street (WTR-2)**  
**San Francisco, CA 94105**

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desk: 415.972.3483
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**Cc:** Amato, Paul <[Amato.Paul@epa.gov](mailto:Amato.Paul@epa.gov)>  
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Phone: (415) 972-3467

Fax: (415) 947-3537

Email: louis.gail@epa.gov

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Cc: Downing, Donna[Downing.Donna@epa.gov]
From: Kwok, Rose
Sent: Wed 5/3/2017 5:31:18 PM
Subject: Re: Final WOTUS ppt for R9 RTOC ?
WOTUS2 tribal info and consultation - RTOC.pptx

I don't think my personal computer has the font that the PPT is in - can someone check this to make sure the slides look ok? Jason - I've updated the title slide and the next steps slide to make it up-to-date. Please let the tribes know that the content in this PPT is the same as the one from April and will be the same for the webinar in May. Thanks!!!

Rose Kwok

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**Subject:** Final WOTUS ppt for R9 RTOC ?

Hi guys – Can you make sure I have the final, please? Cheers - JB

**Jason A. Brush**  
**Acting Assistant Director, Water Division**  
**U.S. Environmental Protection Agency, Region 9**  
**75 Hawthorne Street (WTR-2)**  
**San Francisco, CA 94105**

~~~~~  
desk: 415.972.3483
~~~~~

**From:** Louis, Gail  
**Sent:** Wednesday, May 03, 2017 9:43 AM  
**To:** Brush, Jason <Brush.Jason@epa.gov>  
**Cc:** Amato, Paul <Amato.Paul@epa.gov>  
**Subject:** FW: WOTUS Information Session at May R9 RTOC Meeting



This is the latest version I saw. We need to correct the typo (Regional Tribal Operations Committee).

~~~~~>(((^>~~~~~>(((^>~~~~~>(((^>  
Gail Louis, Manager

Tribal Water Section

US EPA Region 9, Water Division
75 Hawthorne Street (WTR-3-4)
San Francisco, CA 94105
Phone: (415) 972-3467
Fax: (415) 947-3537
Email: louis.gail@epa.gov

~~~~~>(((^>~~~~~>(((^>~~~~~>(((^>

**From:** Christensen, Damaris  
**Sent:** Monday, April 24, 2017 2:17 PM  
**To:** Ebbert, Laura <[Ebbert.Laura@epa.gov](mailto:Ebbert.Laura@epa.gov)>; Amato, Paul <[Amato.Paul@epa.gov](mailto:Amato.Paul@epa.gov)>; Brush, Jason <[Brush.Jason@epa.gov](mailto:Brush.Jason@epa.gov)>; Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>; Bennett, Brittany <[bennett.brittany@epa.gov](mailto:bennett.brittany@epa.gov)>; Mojica Hernandez, Ruben <[mojica-hernandez.ruben@epa.gov](mailto:mojica-hernandez.ruben@epa.gov)>; Louis, Gail <[Louis.Gail@epa.gov](mailto:Louis.Gail@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>  
**Subject:** RE: WOTUS Information Session at May R9 RTOC Meeting

Still draft, but a slightly later version per our discussion today.

Damaris

**From:** Christensen, Damaris  
**Sent:** Monday, April 24, 2017 11:22 AM  
**To:** Ebbert, Laura <[Ebbert.Laura@epa.gov](mailto:Ebbert.Laura@epa.gov)>; Amato, Paul <[Amato.Paul@epa.gov](mailto:Amato.Paul@epa.gov)>; Brush,

Jason <[Brush.Jason@epa.gov](mailto:Brush.Jason@epa.gov)>; Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>; Bennett, Brittany <[bennett.brittany@epa.gov](mailto:bennett.brittany@epa.gov)>; Mojica Hernandez, Ruben <[mojica-hernandez.ruben@epa.gov](mailto:mojica-hernandez.ruben@epa.gov)>; Louis, Gail <[Louis.Gail@epa.gov](mailto:Louis.Gail@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>; Kwok, Rose <[kwok.rose@epa.gov](mailto:kwok.rose@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>  
**Subject:** RE: WOTUS Information Session at May R9 RTOC Meeting

Here's the DRAFT powerpoint.

Damaris

-----Original Appointment-----

**From:** Christensen, Damaris

**Sent:** Saturday, April 22, 2017 10:56 PM

**To:** Christensen, Damaris; Ebbert, Laura; Amato, Paul; Brush, Jason; Eisenberg, Mindy; Bennett, Brittany; Mojica Hernandez, Ruben; Louis, Gail

**Cc:** Gude, Karen; Kwok, Rose; Wesson, Dolores

**Subject:** WOTUS Information Session at May R9 RTOC Meeting

**When:** Monday, April 24, 2017 3:30 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).

**Where:** DCRoomWest7129/DC-CCW-OWOW also

Nonresponsive Conference Code/ Ex. 6

Hi all,

Call-in: Nonresponsive Conference Code/ Ex. 6

This is to touch base about the R9 RTOC tribal info session/ leader to leader consultation. Karen is on AL till Wednesday, but then I'm out till the end of the week, so we'll make sure to coordinate here at HQ.

I'm attaching the tribal consultation letter that went out Thursday, and Karen's email below

initially reaching out to Laura. We have a draft powerpoint as well and I'll try to send a copy of that when we get a few more comments from people.

I do have one question for you all: is this meeting set-up likely to allow for people from EPA HQ or Corps HQ to call in?

Damaris

Rose – since you have another meeting scheduled tentatively at this time, and will be in Utah at another meeting May 3-4, don't feel you have to attend this, but consider it an FYI.

**From:** Gude, Karen

**Sent:** Tuesday, April 18, 2017 7:13 AM

**To:** Ebbert, Laura <[Ebbert.Laura@epa.gov](mailto:Ebbert.Laura@epa.gov)>

**Cc:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>

**Subject:** Seeking WOUS Information Session at May R9 RTOC Meeting, if Possible

Laura,

Hi. I wanted to follow up to our conversation late last week with regard to the possibility of scheduling an information session for tribes with regard to the upcoming tribal consultation and coordination on a forthcoming proposal to rescind and then revise the definition of "waters of the United States." (Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015)). If possible, we would like to schedule a session with tribes on May 4 as part of the Region 9 RTOC meeting, structuring the meeting as an information session with tribes, followed by a few minutes reserved for government-to-government consultation and/or tribal comments to allow tribes that are willing and/or able to provide input.

I'm including some background information on this effort below. OW plans to initiate tribal consultation as early as this week. I'm cc'ing Damaris Christensen and Delores Wesson, both of OW/OWOW, who have been working on the tribal consultation preparations related to this

action, for awareness. OWOW is working to confirm a point person to present information/manage the tribal information session at the R9 RTOC meeting.

Any assistance in coordinating and/or scheduling a session at the RTOC would be greatly appreciated. If you should have any questions or concerns or should need any additional information from us, please do not hesitate to let me know.

**Background information:**

*On February 28, the President issued an Executive Order on “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” The EO states that it is in the national interest to ensure that the nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the states under the Constitution. The EO directs EPA and ACOE: (1) to review the existing Clean Water Rule (CWR) for consistency with these priorities and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law, and (2) to consider interpreting the term “navigable waters,” in a manner consistent with the Scalia opinion in Rapanos v. U.S.*

*The agencies intend to follow an expeditious, two-step process that will provide certainty across the country: (1) an initial rulemaking to rescind the 2015 rule and reinstate the regulatory approach that, except for a brief two-month period prior to the Sixth Circuit Court of Appeals’ stay of the 2015 rule, has been the regulation in place since 1986, and thus maintains the status quo, and (2) a second rulemaking to revise the definition of waters of the U.S. consistent with direction in the E.O. Justice Scalia’s Rapanos opinion indicates Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.*

OW plans to

Deliberative Process / Ex. 5

**Deliberative Process / Ex. 5**

Thank you,

Karen Gude

Tribal Program Coordinator (detail)

U.S. EPA/Office of Water

Phone: (202) 564-0831

**To:** Christensen, Damaris[Christensen.Damaris@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]  
**Cc:** Downing, Donna[Downing.Donna@epa.gov]  
**From:** Brush, Jason  
**Sent:** Wed 5/3/2017 4:47:34 PM  
**Subject:** Final WOTUS ppt for R9 RTOC ?  
WOTUS2 tribal info and consultation.pptx

Hi guys – Can you make sure I have the final, please? Cheers - JB

**Jason A. Brush**  
**Acting Assistant Director, Water Division**  
**U.S. Environmental Protection Agency, Region 9**  
**75 Hawthorne Street (WTR-2)**  
**San Francisco, CA 94105**

~~~~~  
desk: 415.972.3483
~~~~~

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**Sent:** Wednesday, May 03, 2017 9:43 AM  
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Gail Louis, Manager

Tribal Water Section

US EPA Region 9, Water Division
75 Hawthorne Street (WTR-3-4)
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Fax: (415) 947-3537
Email: louis.gail@epa.gov

-----Original Appointment-----

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Sent: Saturday, April 22, 2017 10:56 PM

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Cc: Gude, Karen; Kwok, Rose; Wesson, Dolores

Subject: WOTUS Information Session at May R9 RTOC Meeting

When: Monday, April 24, 2017 3:30 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).

Where: DCRoomWest7129/DC-CCW-OWOW also **Nonresponsive Conference Code/ Ex. 6**

Hi all,

Call-in: **Nonresponsive Conference Code/ Ex. 6**

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I'm attaching the tribal consultation letter that went out Thursday, and Karen's email below initially reaching out to Laura. We have a draft powerpoint as well and I'll try to send a copy of that when we get a few more comments from people.

I do have one question for you all: is this meeting set-up likely to allow for people from EPA HQ or Corps HQ to call in?

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From: Gude, Karen
Sent: Tuesday, April 18, 2017 7:13 AM
To: Ebbert, Laura <Ebbert.Laura@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>
Subject: Seeking WOUS Information Session at May R9 RTOC Meeting, if Possible

Laura,

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I’m including some background information on this effort below. OW plans to initiate tribal consultation as early as this week. I’m cc’ing Damaris Christensen and Delores Wesson, both of OW/OWOW, who have been working on the tribal consultation preparations related to this action, for awareness. OWOW is working to confirm a point person to present information/manage the tribal information session at the R9 RTOC meeting.

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(CWR) for consistency with these priorities and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law, and (2) to consider interpreting the term "navigable waters," in a manner consistent with the Scalia opinion in Rapanos v. U.S.

The agencies intend to follow an expeditious, two-step process that will provide certainty across the country: (1) an initial rulemaking to rescind the 2015 rule and reinstate the regulatory approach that, except for a brief two-month period prior to the Sixth Circuit Court of Appeals' stay of the 2015 rule, has been the regulation in place since 1986, and thus maintains the status quo, and (2) a second rulemaking to revise the definition of waters of the U.S. consistent with direction in the E.O. Justice Scalia's Rapanos opinion indicates Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

OW plans to

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thank you,

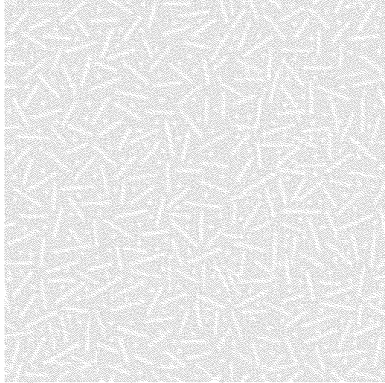
Karen Gude

Tribal Program Coordinator (detail)

U.S. EPA/Office of Water

Phone: (202) 564-0831

To: Downing, Donna[Downing.Donna@epa.gov]
From: Johnson, Terri
Sent: Tue 5/2/2017 1:27:20 PM
Subject: FW: talking points for Benita
[draft Basic Talking Points.docx](#)



Donna, I provided the TPs above to Benita last week and told her I would get her any changes you recommend later this week. She is speaking Monday at an Urban Waters meeting in Grand Rapids associated with River Rally.

I think she wants to let John talk about the rule changes and may have some ideas about what should be said but if you think there are any changes to the attached TPs that I should forward to them please let me know before COB Thru.

Terri

From: Downing, Donna
Sent: Thursday, April 13, 2017 5:53 PM
To: Johnson, Terri <Johnson.Terri@epa.gov>
Subject: RE: talking points for Benita

Hi Terri:

Yeah, we're pretty busy but I did remember your request. I hadn't sent any TPs because the

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

With that warning, attached please find the current set of talking points. Let's touch base closer to Rally time to make sure the TPs reflect the then-latest public position.

Thanks!

Donna

From: Johnson, Terri
Sent: Thursday, April 13, 2017 4:23 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: FW: talking points for Benita

I know you must be crazy busy but if you have a chance to forward the talking points you mentioned for the CWA rule it would help me as I develop talking points for Benita and John

I need to get the first draft off to Surabhi Shah for review then they go to Benita for the briefing.

From: Johnson, Terri
Sent: Wednesday, April 05, 2017 12:55 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: talking points for Benita

Rally is May 8th – 11th and she will be talking to NGOs, our regions and other Feds.

Thanks Donna

Terri Johnson

EPA- Office of Water

Urban Waters Program

202-564-8296

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]
Cc: Kwok, Rose[Kwok.Rose@epa.gov]
From: Christensen, Damaris
Sent: Tue 5/2/2017 4:21:02 AM
Subject: agendas and things to discuss
[interagency agenda WOTUS 02 May 2017.docx](#)
[Agenda -- WOTUS 03 May 2017.docx](#)
[wotus2 governors letter.docx](#)

I've attached two draft agendas. I couldn't find a model for a Tuesday agenda so just adapted from Wednesdays.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Damaris

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]
From: Christensen, Damaris
Sent: Mon 5/1/2017 1:21:05 PM
Subject: RE: New Concern (OW WOTUS)

Mindy, would it make sense to invite Karen to this morning's 10:15? Or just keep this in mind and keep Karen apprised later?

From: Gude, Karen
Sent: Monday, May 01, 2017 8:58 AM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>
Cc: Lousberg, Macara <Lousberg.Macara@epa.gov>
Subject: FW: New Concern (OW WOTUS)

All,

Just FYI – Forwarding concern expressed by R9 RTOC Tribal Cochair re: tribal trust responsibility; second paragraph mentions 4/27 WOUS call.

Thanks,

Karen

From: Ebbert, Laura
Sent: Friday, April 28, 2017 11:32 PM
To: Brush, Jason <Brush.Jason@epa.gov>; Gude, Karen <Gude.Karen@epa.gov>; Louis, Gail <Louis.Gail@epa.gov>
Subject: FW: New Concern (OW WOTUS)

Karen, see email below that I am transmitting without comment from our RTOC Tribal Cochair.

LE

Laura Ebbert

Manager, Tribal Section

Land Division, LND-3-1

U.S. Environmental Protection Agency, Region 9

75 Hawthorne Street

San Francisco, CA 94105

(415) 947-3561

<http://www.epa.gov/region9/tribal>

From: a.bacock@bigpinepaiute.org [mailto:a.bacock@bigpinepaiute.org]

Sent: Friday, April 28, 2017 12:52 PM

To: Ebbert, Laura <Ebbert.Laura@epa.gov>

Subject: New Concern

Laura,

I have not received any additional issues from tribes like I thought I would, but I do want to share something that is showing itself to be a pattern.

In reviewing notes from the Salton Sea call between EPA and tribes, hearing feedback from a call between Yerington Paiute Tribe and EPA regarding the Anaconda Superfund site...I am gathering an impression that trust responsibility to Tribes is waning. I know that is a general statement to make, but it appears that EPA priorities are shifting rapidly due to the new administration and it is having an impact on many different levels...including EPAs relationship with Tribes. I am sure that this sentiment will come forward during the Tribal Caucus and wanted you to be aware of what is most likely going to be an issue to be brought up.

I would say that this change is also showing itself at the DC level as the Office of Water held a call

yesterday which had some pathetic answers to questions from tribes. One question was why they were focusing in on Justice Scalia's opinion exclusively when reviewing the Waters of the US and not also relying on Justice Kennedy's opinion which has helped to shape the conversation to date. The answer was basically that EPA can use or not use whatever it wants to in order to define the regulation.

It appears that the Agency as a whole is trying to avoid scrutiny from the new administration and has hit a new low for morale which in combination is not helping our relationship.

Alan Bacock

Water Program Coordinator

Big Pine Paiute Tribe of the Owens Valley

760-938-2003 ext. 235

To: Downing, Donna[Downing.Donna@epa.gov]
From: Dreyfus, Melissa G.
Sent: Fri 4/28/2017 4:41:52 PM
Subject: waters of us handout
04 Kwok WatersoftheUS Handouts DC Dec2016.docx

Donna,

There is also this Waters of the US handout. Would you like to use/edit it?

Thanks!

melissa

Melissa Greer Dreyfus

National Water Quality Standards Branch, SHPD

Office of Science and Technology

Office of Water

U.S. Environmental Protection Agency

Phone: 202-566-9989

email: dreyfus.melissa@epa.gov

To: Downing, Donna[Downing.Donna@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Barbery, Andrea
Sent: Thur 4/27/2017 9:05:07 PM
Subject: FW: Summary of EPW Hearing: A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule
Hearing Summary Senate EPW Review of WOTUS 04-26-17.docx

Y'all probably already saw the hearing but I wanted to share Denis' excellent summary. See also [this link](#) to Pruitt's statement.

From: Borum, Denis
Sent: Thursday, April 27, 2017 4:45 PM
To: AO-OCIR Everyone <AOOCIR_Everyone@epa.gov>; RCL's <CNRCLsOIntergov._Contacts@epa.gov>
Cc: Peck, Gregory <Peck.Gregory@epa.gov>; Orvin, Chris <Orvin.Chris@epa.gov>
Subject: Summary of EPW Hearing: A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule

All –

Please see attached and let me know of any questions. Thank you

Denis

Denis R. Borum

Congressional Liaison Specialist

Office of Congressional and Intergovernmental Relations

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, N.W. (MC-1301A)

Washington, D.C. 20460

(202) 564-4836 (phone)

(202) 501-1549 (fax)

borum.denis@epa.gov (e-mail)

To: Downing, Donna[Downing.Donna@epa.gov]
From: Kwok, Rose
Sent: Tue 4/25/2017 11:34:17 PM
Subject: RE: Request to **Personal Matters / Ex. 6**
6thCircuit-10-9-2015 CWR stay order.PDF

Here it is – page 5 is the Order itself (page 15):

In the extant briefing, respondents have not persuasively rebutted either of petitioners' showings. Although the record compiled by respondent agencies is extensive, respondents have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered. Respondents maintain that the notice requirements were met by their having invited recommendations of "geographical limits" and "distance limitations." Perhaps. But whether such general notice satisfies the "logical outgrowth" standard requires closer scrutiny. Nor have respondents identified specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose. Their argument that "brightline tests are a fact of regulatory life" and that they used "their technical expertise to promulgate a practical rule" is undoubtedly true, but not sufficient. At this stage, at least, we are satisfied that petitioners have met their burden of showing a substantial possibility of success on the merits.

From: Downing, Donna
Sent: Tuesday, April 25, 2017 7:30 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Hmmm. I bet the **Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5

From: Kwok, Rose
Sent: Tuesday, April 25, 2017 7:27 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Yeah – let me know if you have

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Downing, Donna

Sent: Tuesday, April 25, 2017 7:20 PM

To: Kwok, Rose <Kwok.Rose@epa.gov>

Subject: RE: Request to Personal Matters / Ex. 6

Yeah. Elsewhere in the opinion it's

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Donna

PS just got done with my seventh hour of teaching today, so yee-haw!

From: Kwok, Rose

Sent: Tuesday, April 25, 2017 6:10 PM

To: Downing, Donna <Downing.Donna@epa.gov>

Subject: RE: Request to Personal Matters / Ex. 6

I found this sentence gave

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Downing, Donna
Sent: Tuesday, April 25, 2017 6:00 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

I looked at a version last night, which seems to **Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5 Many changes made in response to today's 1pm meeting? I'm expecting to look at the preamble again this evening, and perhaps go to the airport a bit early and call into the 10am meeting (Mindy's number, right?). This isn't much fun.

Deliberative Process / Ex. 5

Donna

From: Kwok, Rose
Sent: Tuesday, April 25, 2017 5:57 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

If you have time, take a look at the preamble. **Deliberative Process / Ex. 5**

From: Downing, Donna
Sent: Tuesday, April 25, 2017 5:41 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Hi, sorry Rose about letting travel schedules delay my affirming that your request sounds good to me. Cynthia, could you make it so in People Plus? Thanks!

Donna

From: Kwok, Rose
Sent: Tuesday, April 25, 2017 11:43 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Hi Donna – checking in on this request again. Thanks

From: Kwok, Rose
Sent: Tuesday, April 18, 2017 9:08 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Hi Donna – just wanted to check up on my request from last week. Thanks!

From: Kwok, Rose
Sent: Wednesday, April 12, 2017 7:45 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: Request to **Personal Matters / Ex. 6**

Hi Donna,

For an upcoming pay period, I'd like to request to **Nonresponsive Discussion of Personal Matters / Ex. 6**
Nonresponsive Discussion of Personal Matters / Ex. 6 Please let Cynthia and I know if this is okay – thanks! This request is for that pay period only

Rose

To: Downing, Donna[Downing.Donna@epa.gov]
From: Kwok, Rose
Sent: Tue 4/25/2017 11:26:57 PM
Subject: RE: Request to **Personal Matters / Ex. 6**

Yeah – let me know if you have any

Deliberative Process / Ex. 5

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Subject: RE: Request to **Personal Matters / Ex. 6**

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Deliberative Process / Ex. 5
Deliberative Process / Ex. 5 Many changes made in response to today's 1pm meeting? I'm expecting to look at the preamble again this evening, and perhaps go to the airport a bit early and call into the 10am meeting (Mindy's number, right?). This isn't much fun.

Deliberative Process / Ex. 5

Donna

From: Kwok, Rose
Sent: Tuesday, April 25, 2017 5:57 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

If you have time, take a look at the preamble. **Deliberative Process / Ex. 5**

From: Downing, Donna
Sent: Tuesday, April 25, 2017 5:41 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Hi, sorry Rose about letting travel schedules delay my affirming that your request sounds good to me. Cynthia, could you make it so in People Plus? Thanks!

Donna

From: Kwok, Rose
Sent: Tuesday, April 25, 2017 11:43 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Hi Donna – checking in on this request again. Thanks

From: Kwok, Rose
Sent: Tuesday, April 18, 2017 9:08 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Hi Donna – just wanted to check up on my request from last week. Thanks!

From: Kwok, Rose
Sent: Wednesday, April 12, 2017 7:45 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: Request to **Personal Matters / Ex. 6**

Hi Donna,

For an upcoming pay period, I'd like to **Personal Matters / Ex. 6**
Personal Matters / Ex. 6 Please let Cynthia and I know if this is okay – thanks! This request is for that pay period only

Rose

To: Downing, Donna[Downing.Donna@epa.gov]
From: Kwok, Rose
Sent: Tue 4/25/2017 10:10:15 PM
Subject: RE: Request to **Personal Matters / Ex. 6**

I found this sentence gave

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Downing, Donna
Sent: Tuesday, April 25, 2017 6:00 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

I looked at a version last night, which seems to

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5 Many changes made in response to today's 1pm meeting? I'm expecting to look at the preamble again this evening, and perhaps go to the airport a bit early and call into the 10am meeting (Mindy's number, right?). This isn't much fun.

Deliberative Process / Ex. 5

Donna

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Sent: Tuesday, April 25, 2017 5:57 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

If you have time, take a look at the preamble. **Deliberative Process / Ex. 5**

From: Downing, Donna
Sent: Tuesday, April 25, 2017 5:41 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

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Donna

From: Kwok, Rose
Sent: Tuesday, April 25, 2017 11:43 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Hi Donna – checking in on this request again. Thanks

From: Kwok, Rose
Sent: Tuesday, April 18, 2017 9:08 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: RE: Request to **Personal Matters / Ex. 6**

Hi Donna – just wanted to check up on my request from last week. Thanks!

From: Kwok, Rose
Sent: Wednesday, April 12, 2017 7:45 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Subject: Request to **Personal Matters / Ex. 6**

Hi Donna,

For an upcoming pay period, I'd like to request to **Personal Matters / Ex. 6**
Personal Matters / Ex. 6. Please let Cynthia and I know if this is okay – thanks! This request is for that pay period only

Rose

To: Downing, Donna[Downing.Donna@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Johnson, CynthiaN
Sent: Fri 4/21/2017 8:38:22 PM
Subject: RE: Please make a 1-time change to Donna's CD

Done.

Cynthia N. Johnson, MPA
Environmental Protection Specialist
U.S. Environmental Protection Agency
Office of Water
Office of Wetlands, Oceans and Watersheds
Wetlands Division
Johnson.CynthiaN@EPA.gov
Phone: (202) 566-1679
Fax: (202) 566-1349

Mailing Address:
1200 Penn. Ave, NW MC: 4502T
Washington, DC 20460

"Nature is the true revelation of the Deity to man. The nearest green field is the inspired page from which you may read all that it is needful for you to know." -Arthur Conan Doyle, Sr.

-----Original Message-----

From: Downing, Donna
Sent: Monday, April 17, 2017 12:44 PM
To: Johnson, CynthiaN <Johnson.CynthiaN@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: Please make a 1-time change to Donna's CD

Hi Cynthia --

Nonresponsive Discussion of Personal Matters / Ex. 6

Thanks!

Donna

-----Original Message-----

From: Eisenberg, Mindy
Sent: Monday, April 17, 2017 12:36 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: A couple of questions and an FYI

Hi Donna,

I'm fine with **Nonresponsive Discussion of Personal Matters / Ex. 6**

For Corps meeting today - I have a couple of quick things. Is there anything rule-related to touch on? I

Deliberative Process / Ex. 5

thanks

Mindy Eisenberg
Acting Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

-----Original Message-----

From: Downing, Donna
Sent: Monday, April 17, 2017 12:12 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: A couple of questions and an FYI

Hiya Mindy --

Since you were on the phone when I stuck my head in (twice), I decided it would be less disruptive and more helpful to send you an email with my couple of questions --

-- when is the meeting with Mike this afternoon for the draft run-through Federalism powerpoint? If possible, I'd be very interested in attending.

-- Are we on with the Corps this afternoon at 2pm?? I don't know of non-WOTUS agenda items, but know you might have some.

Nonresponsive Discussion of Personal Matters / Ex. 6

FYI, I'll be sending an agenda for the Wednesday 10am meeting for your consideration shortly. (First am coordinating with Simma on the preamble).

Thanks for any thoughts you might have!

Donna

-----Original Message-----

From: Eisenberg, Mindy
Sent: Monday, April 17, 2017 11:29 AM
To: Kupchan, Simma <Kupchan.Simma@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Stacey.M.Jensen@usace.army.mil; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: Federalism powerpoint

Hi Simma,

We're going to be meeting with Mike Shapiro this afternoon to **Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5

Mindy

Mindy Eisenberg
Acting Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460

(202) 566-1290
eisenberg.mindy@epa.gov

-----Original Message-----

From: Kupchan, Simma
Sent: Monday, April 17, 2017 10:49 AM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Stacey.M.Jensen@usace.army.mil; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: Federalism powerpoint

I think the revised version looks good. Thanks for all of your work on this, Damaris and everyone else.

My only question is about Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thanks,

Simma Kupchan
Water Law Office
US EPA Office of General Counsel
William Jefferson Clinton Building North Room 7426Q
(p) 202-564-3105

-----Original Message-----

From: Christensen, Damaris
Sent: Friday, April 14, 2017 10:09 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Stacey.M.Jensen@usace.army.mil; Cindy Barger <cindy.s.barger.civ@mail.mil>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: Federalism powerpoint

Several sharepoint glitches later, the federalism ppt is up to date. I suggest that this group identify any additional edits by early afternoon Monday, especially focusing on the later (new) slides where I lay out a range of paths forward.

By Monday COB we should be ready to forward up, with the understanding that Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Here's the link.

Nonresponsive Internal URL/ Ex. 6

Also in the federalism folder shortly will be a draft agenda and a draft run of show. You are welcome to

peek at early drafts but I'll send a link around after I've had a chance to touch base with Jake Strickler, who is facilitating, on Monday.

Damaris

-----Original Message-----

From: Christensen, Damaris [mailto:Christensen.Damaris@epa.gov]

Sent: Friday, April 14, 2017 5:05 PM

To: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Stacey.M.Jensen@usace.army.mil; Cindy Barger <cindy.s.barger.civ@mail.mil>

Subject: Heads up

I'll be sending around a link to review the new content-added federalism PowerPoint in a couple hours.

Nonresponsive Discussion of Personal Matters / Ex. 6

Damaris

Sent from my iPhone

To: Downing, Donna[Downing.Donna@epa.gov]
From: Wesson, Dolores
Sent: Thur 4/20/2017 10:30:10 PM
Subject: FW: WOTUS Federalism Meeting notes - 4.19.17
Meeting Notes - WOTUS Consultation 4.19.17 - JSG.docx

Donna, I just got these from Julia. They may be of help.

Dolores

From: Schaefer-Gomez, Julia
Sent: Thursday, April 20, 2017 6:02 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>
Cc: Wesson, Dolores <Wesson.Dolores@epa.gov>
Subject: WOTUS Federalism Meeting notes - 4.19.17

Hi Rose,

Sorry for the delay – attached are my meeting notes from yesterday's WOTUS public meeting.

Thanks!

Julia Schaefer Gomez

ORISE Research Participant

U.S. Environmental Protection Agency

Ocean and Coastal Protection Division

Schaefer-Gomez.Julia@epa.gov

(202) 566-2960

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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POTTER STEWART U.S. COURTHOUSE
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www.ca6.uscourts.gov

Filed: October 09, 2015

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Re: Case Nos. 15-3751/15-3799/15-3817/15-3820/15-3822/15-3823/15-3831/15-3837/15-3839/15-3850/15-3853/15-3858/15-3885/15-3887/15-3948,
In re: EPA; Originating Case No. : EPA-HQ-OW-2011-0880

Dear Counsel,

The Court issued the enclosed order today in this case.

Sincerely yours,

s/Cathryn Lovely for Amy Gigliotti
Opinions Deputy
Direct Dial No. 513-564-7012

Enclosure

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0246p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: ENVIRONMENTAL PROTECTION AGENCY
AND DEPARTMENT OF DEFENSE FINAL RULE;
“CLEAN WATER RULE: DEFINITION OF WATERS OF
THE UNITED STATES,” 80 FED. REG. 37,054
(JUNE 29, 2015).

Nos. 15-3799/3822/3853/3887

STATE OF OHIO, STATE OF MICHIGAN, and STATE
OF TENNESSEE (15-3799); STATE OF OKLAHOMA
(15-3822); STATE OF TEXAS, STATE OF LOUISIANA,
and STATE OF MISSISSIPPI (15-3853); STATE OF
GEORGIA, STATE OF WEST VIRGINIA, STATE OF
ALABAMA, STATE OF FLORIDA, STATE OF INDIANA,
STATE OF KANSAS, COMMONWEALTH OF KENTUCKY,
NORTH CAROLINA DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES, STATE OF SOUTH
CAROLINA, STATE OF UTAH, and STATE OF
WISCONSIN(15-3887),

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Petition for Review of a Final Rule from the United States Army
Corps of Engineers and the Environmental Protection Administration.

No. EPA-HQ-OW-2011; Judicial Panel on Multi-District Litigation, No. 135.

Decided and Filed: October 9, 2015

Before: KEITH, McKEAGUE and GRIFFIN, Circuit Judges.

McKEAGUE, J., delivered the order of the court in which GRIFFIN, J., joined. KEITH,
J. (pg. 7), delivered a separate dissent.

Nos. 15-3799/ 3822/ *State of Ohio, et al. v. U.S. Army Corps of Eng'rs, et al.* Page 2
3853/ 3887

ORDER OF STAY

McKEAGUE, Circuit Judge. Petitioners in these four actions, transferred to and consolidated in this court by the Judicial Panel on Multi-District Litigation for handling as a multi-circuit case, represent eighteen states¹ who challenge the validity of a Final Rule adopted by respondents U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency, “the Clean Water Rule.” 80 Fed. Reg. 37,054 (June 29, 2015). The Clean Water Rule clarifies the definition of “waters of the United States,” as used in the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, “through increased use of bright-line boundaries” to make “the process of identifying waters protected under the Clean Water Act easier to understand, more predictable and consistent with the law and peer reviewed science, while protecting the streams and wetlands that form the foundation of our nation’s water resources.” 80 Fed. Reg. at 37,055. Petitioner states contend that the definitional changes effect an expansion of respondent agencies’ regulatory jurisdiction and dramatically alter the existing balance of federal-state collaboration in restoring and maintaining the integrity of the nation’s waters. Petitioners also contend the new bright-line boundaries used to determine which tributaries and waters adjacent to navigable waters have a “significant nexus” to waters protected under the Act are not consistent with the law as defined by the Supreme Court, and were adopted by a process that failed to conform to the rulemaking requirements of the Administrative Procedures Act (“APA”).

Although petitioners have moved the court to dismiss their own petitions for lack of subject matter jurisdiction under 33 U.S.C. § 1369(b)(1)—a matter on which briefing is pending—they also move for a stay of the Clean Water Rule pending completion of the court’s review. Respondents and numerous intervenors oppose the stay.² Respondents contend that we

¹The eighteen petitioner states are Ohio, Michigan, Tennessee, Oklahoma, Texas, Louisiana, Mississippi, Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah and Wisconsin.

²Among the respondent-intervenors are several environmental conservation groups and several respondent-intervenor states who support the new Rule: New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington and the District of Columbia.

Nos. 15-3799/ 3822/ *State of Ohio, et al. v. U.S. Army Corps of Eng'rs, et al.* Page 3
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have jurisdiction, but insist that petitioners have not made the requisite showing to justify a stay of the Rule that became effective August 28, 2015. For reasons that follow, we now grant the stay pending determination of our jurisdiction.

The parties agree that our decision is guided by consideration of four factors: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). *See also Nken v. Holder*, 556 U.S. 418, 433 (2009). These are not prerequisites that must be met, but interrelated considerations that must be balanced. *Griepentrog*, 945 F.3d at 153. The motion for stay is addressed to our discretion, early in the case based on incomplete factual development and legal research, for the purpose of preserving the status quo pending further proceedings. *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). The party seeking a stay bears the burden of showing that the circumstances of the particular case justify exercise of our discretion, guided by sound legal principles, to maintain the status quo pending conclusive determination of the legality of the action. *Nken*, 556 U.S. at 433–34.

The present circumstances pose a threshold question: What is the status quo? Petitioners ask us to stay enforcement of the Clean Water Rule that went into effect on August 28, 2015. They ask us to restore the status quo as it existed before the Rule went into effect. Respondents’ position is that the status quo is best preserved by leaving the Rule alone. Considering the pervasive nationwide impact of the new Rule on state and federal regulation of the nation’s waters, and the still open question whether, under the Clean Water Act, this litigation is properly pursued in this court or in the district courts, we conclude that petitioners have acted without undue delay and that the status quo at issue is the pre-Rule regime of federal-state collaboration that has been in place for several years, following the Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006).

Regarding this “open question,” we are mindful of the dissent’s concern that we should not consider exercising our discretionary power to issue a stay before confirming our jurisdiction

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under the Clean Water Act, 33 U.S.C. § 1369(b)(1), to do so. We have no doubt of our authority, however, “to make orders to preserve the existing conditions and the subject of the petition[s]” pending our receipt and careful consideration of briefing on the jurisdictional question. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947). While petitioners have grounds to question our jurisdiction, *see* § 1369(b)(1), respondents’ contrary position has color as well. *See Nat’l Cotton Council of Am. v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009). Briefing on the jurisdictional question will be completed and the question ripe for decision in a matter of weeks.

Meanwhile, we conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims. Petitioners first claim that the Rule’s treatment of tributaries, “adjacent waters,” and waters having a “significant nexus” to navigable waters is at odds with the Supreme Court’s ruling in *Rapanos*, where the Court vacated the Sixth Circuit’s upholding of wetlands regulation by the Army Corps of Engineers. Even assuming, for present purposes, as the parties do, that Justice Kennedy’s opinion in *Rapanos* represents the best instruction on the permissible parameters of “waters of the United States” as used in the Clean Water Act,³ it is far from clear that the new Rule’s distance limitations are harmonious with the instruction.

Moreover, the rulemaking process by which the distance limitations were adopted is facially suspect. Petitioners contend the proposed rule that was published, on which interested persons were invited to comment, did not include any proposed distance limitations in its use of terms like “adjacent waters” and significant nexus.” Consequently, petitioners contend, the Final Rule cannot be considered a “logical outgrowth” of the rule proposed, as required to satisfy the notice-and-comment requirements of the APA, 5 U.S.C. § 553. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). As a further consequence of this defect, petitioners contend, the record compiled by respondents is devoid of specific scientific support for the distance limitations that were included in the Final Rule. They contend the Rule is therefore not

³There are real questions regarding the collective meaning of the Court’s fragmented opinions in *Rapanos*. *See United States v. Cundiff*, 555 F.3d 200, 208–10 (6th Cir. 2009).

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the product of reasoned decision-making and is vulnerable to attack as impermissibly “arbitrary or capricious” under the APA, 5 U.S.C. § 706(2).

In the extant briefing, respondents have not persuasively rebutted either of petitioners’ showings. Although the record compiled by respondent agencies is extensive, respondents have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered. Respondents maintain that the notice requirements were met by their having invited recommendations of “geographical limits” and “distance limitations.” Perhaps. But whether such general notice satisfies the “logical outgrowth” standard requires closer scrutiny. Nor have respondents identified specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose. Their argument that “bright-line tests are a fact of regulatory life” and that they used “their technical expertise to promulgate a practical rule” is undoubtedly true, but not sufficient. At this stage, at least, we are satisfied that petitioners have met their burden of showing a substantial possibility of success on the merits.

There is no compelling showing that any of the petitioners will suffer immediate irreparable harm—in the form of interference with state sovereignty, or in unrecoverable expenditure of resources as they endeavor to comply with the new regime—if a stay is not issued pending determination of this court’s jurisdiction. But neither is there any indication that the integrity of the nation’s waters will suffer imminent injury if the new scheme is not immediately implemented and enforced.

What is of greater concern to us, in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule’s effective redrawing of jurisdictional lines over certain of the nation’s waters. Given that the definitions of “navigable waters” and “waters of the United States” have been clouded by uncertainty, in spite of (or exacerbated by) a series of Supreme Court decisions over the last thirty years, we appreciate the need for the new Rule. *See Rapanos*, 547 U.S. 715; *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of*

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Engineers, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In one sense, the clarification that the new Rule strives to achieve is long overdue. We also accept that respondent agencies have conscientiously endeavored, within their technical expertise and experience, and based on reliable peer-reviewed science, to promulgate new standards to protect water quality that conform to the Supreme Court's guidance. Yet, the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being.

A stay allows for a more deliberate determination whether this exercise of Executive power, enabled by Congress and explicated by the Supreme Court, is proper under the dictates of federal law. A stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing. A stay honors the policy of cooperative federalism that informs the Clean Water Act and must attend the shared responsibility for safeguarding the nation's waters. *See* 33 U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution."). In light of the disparate rulings on this very question issued by district courts around the country—enforcement of the Rule having been preliminarily enjoined in thirteen states⁴—a stay will, consistent with Congress's stated purpose of establishing a national policy, 33 U.S.C. § 1251(a), restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review.

Accordingly, on due review of the relevant considerations in light of the briefs filed by petitioners, respondents and intervenors, and in the exercise of our discretion, we GRANT petitioners' motion for stay. The Clean Water Rule is hereby STAYED, nationwide, pending further order of the court.

⁴*See North Dakota v. U.S. E.P.A.*, No. 3:15-cv-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015) (staying operation of the Rule in North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico).

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DISSENT

KEITH, Circuit Judge, dissenting. Because I believe that it is not prudent for a court to act before it determines that it has subject-matter jurisdiction, I respectfully dissent.

If we lack jurisdiction to review the Rule, then we lack jurisdiction to grant a stay. *See Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77–78 (D.C. Cir. 1984) (holding that a district court did not have jurisdiction to review a rule or issue a writ of mandamus because of a special review statute that assigned judicial review to the courts of appeals); *see also Greater Detroit Recovery Auth. v. EPA*, 916 F.2d 317, 321–24 (6th Cir. 1990) (holding that a district court was without subject-matter jurisdiction and, therefore, did not have the authority to award attorneys' fees because a special review statute gave the courts of appeals exclusive jurisdiction).

One of the issues in this case is whether this court has exclusive jurisdiction to review the Rule in the first instance. We can enjoin implementation of the Rule if we determine that we have jurisdiction. But until that question is answered, our subject-matter jurisdiction is in doubt, and I do not believe we should stay implementation of the Clean Water Rule.

Because subject-matter jurisdiction is a threshold determination, I do not reach the merits of the petitioners' motion.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

To: Cantilli, Robert[Cantilli.Robert@epa.gov]; Alexander, Laurie[Alexander.Laurie@epa.gov]
Cc: Downing, Donna[Downing.Donna@epa.gov]; Fegley, Robert[Fegley.Robert@epa.gov]
From: Kwok, Rose
Sent: Thur 4/20/2017 6:50:11 PM
Subject: RE: Agenda for today's WOTUS-2 Regional-HQ Workgroup Meeting, plus some WOTUS-related materials
FW: FYI tribal consultation letter distribution list

Bob – as indicated in my other email to you today (attached), I realized when forwarding you the materials that Donna had not added you both to the invite, and that I would follow up with her to make sure that she does. Sorry for the oversight – there is a lot that is going on here, and at a very quick speed.

Deliberative Process / Ex. 5

We will include you and Laurie **Deliberative Process / Ex. 5** moving forward. Thanks.

From: Cantilli, Robert
Sent: Thursday, April 20, 2017 2:44 PM
To: Kwok, Rose <Kwok.Rose@epa.gov>; Alexander, Laurie <Alexander.Laurie@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; Fegley, Robert <Fegley.Robert@epa.gov>
Subject: RE: Agenda for today's WOTUS-2 Regional-HQ Workgroup Meeting, plus some WOTUS-related materials

Thanks for the info but can we be included in future workgroup meetings? Any reason we were not invited? (We are one of the 4 core offices required to concur on all significant regs.) I noticed other core offices were in attendance – OGC, OECA. Bob.

From: Kwok, Rose
Sent: Thursday, April 20, 2017 1:55 PM
To: Cantilli, Robert <Cantilli.Robert@epa.gov>; Alexander, Laurie <Alexander.Laurie@epa.gov>
Subject: FW: Agenda for today's WOTUS-2 Regional-HQ Workgroup Meeting, plus some WOTUS-related materials

The connectivity report was brought up several times at the federalism meeting yesterday. Laurie – I can touch base with you tomorrow at our 10 am call. Thanks! Bob, let me know if you have questions.

From: Downing, Donna

Sent: Thursday, April 20, 2017 12:03 PM

To: Sachs, Erica <Sachs.Erica@epa.gov>; Williams, Ann <Williams.Ann@epa.gov>; Keating, Jim <Keating.Jim@epa.gov>; Bennett, Brittany <bennett.brittany@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Balasa, Kate <balasa.kate@epa.gov>; Palomaki, Ashley <Palomaki.Ashley@epa.gov>; DCRoomWest7301/DC-CCW-OWOW <DCRoomWest7301@epa.gov>; Yu, Yone <yu.yone@epa.gov>; Weaver, Kerryann <weaver.kerryann@epa.gov>; Somerville, Eric <Somerville.Eric@epa.gov>; Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>; Montella, Daniel <Montella.Daniel@epa.gov>; Lapp, Jeffrey <lapp.jeffrey@epa.gov>; Shamet, Stefania <Shamet.Stefania@epa.gov>; Able, Tony <Able.Tony@epa.gov>; Melgin, Wendy <melgin.wendy@epa.gov>; Schaller, Andrea <schaller.andrea@epa.gov>; Fontenot, Alison <Fontenot.Alison@epa.gov>; Schafer, Jeannette <schafer.jeannette@epa.gov>; McCarthy, Julia <McCarthy.Julia@epa.gov>; Livingston, Peggy <Livingston.Peggy@epa.gov>; Leidy, Robert <Leidy.Robert@epa.gov>; Dean, Heather <Dean.Heather@epa.gov>; Szalay, Endre <Szalay.Endre@epa.gov>; Cherry, Andrew <Cherry.Andrew@epa.gov>; Stokely, Peter <Stokely.Peter@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Flannery-Keith, Erin <Flannery-Keith.Erin@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Auerbach, Daniel <Auerbach.Daniel@epa.gov>; Ludwig-Monty, Sarah <ludwig-monty.sarah@epa.gov>; Speir, Jeffrey <speir.jeffrey@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>

Subject: Agenda for today's WOTUS-2 Regional-HQ Workgroup Meeting, plus some WOTUS-related materials

Hi everybody:

Our biweekly Region-HQ WOTUS meeting is scheduled for today at 1pm. The agenda includes:

- A Sharepoint site for sharing documents among Workgroup members
- Update on Step 1 and Step 2 rules and preambles

To: Muellerleile, Caryn[Muellerleile.Caryn@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
Cc: Nelson, Tomeka[Nelson.Tomeka@epa.gov]; Ruf, Christine[Ruf.Christine@epa.gov]; Evalenko, Sandy[Evalenko.Sandy@epa.gov]
From: Kwok, Rose
Sent: Mon 4/10/2017 6:01:27 PM
Subject: RE: Regulatory Agenda FY 2018 Spreadsheet

Hi Caryn,

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Caryn Muellerleile